Supreme Court, U.S.
FILED

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APPLICATION NUMBER A-474

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

THOMAS B. KEE, PETITIONER

vs.

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

APPENDIX

THOMAS B. KEE, PRO SE

8475 SW 155th Terrace
Miami, Florida 33157
(305) 255 1000
Fax (305) 235 4532

62 pp

CONSTITUTIONAL PROVISIONS RELIED UPON

Section 1, 14th Amendent to the United States Constitution:

All persons born or naturalized in the United States, subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or amenities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection

of the law.

FLORIDA STATUTES

627.607. Time limit on certain defenses

(1) The contract shall include the following provision:

"Time limit on Certain Defenses: After 2 years from the issue date, only fraudulent misstatements in the application may be used to void the policy or deny any claim for loss incurred or disability starting after the 2-year period."

(2) A policy which the insured has the right to continue in force subject to the terms by the timely payment of premium until at least age

50 or, in the case of a policy issued after age 44, for at least 5 years from its date of issue may in lieu of the provision set forth in subsection (1) include the following provision:

"Incontestable:

(a) Misstatements in the Application: After this policy has been in force for 2 years during the insured's lifetime (excluding any period during which the insured is disabled), the insurer cannot contest the statements in the application.

(b) Preexisting Conditions: No claim for loss incurred or disability starting after 2 years from the issue date will be reduced or denied because

a sickness or physical condition, not excluded by name or specific description before the date of loss, had existed before the effective date of coverage."

FLORIDA STATUTES

627,409(1). Representations in applications; warranties

(1) All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations therefor, by or in behalf of the insured or annuitant, shall be deemed to be representations and warranties. Misrepresentation, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless:

(a) They are fraudulent;

(b) They are material either to the acceptance of the risk

or to the hazard assumed by the insurer; or

(c) The insurer in good faith would either not have issued the policy or contract, would not have issued it at the same premium rate,would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

(DO NOT PUBLISH)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 90-5711, 91-5435
Non-Argument Calendar

D.C. Docket No. 88-793-Civ-KLR

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

Plaintiff-Appellee

versus

THOMAS B. KEE,

Defendant, Appellant.

Appeals from the United States District Court
for the Southern District of Florida

(April 27th, 1992)

Before FAY, HATCHETT and DUBINA, Circuit Judges

PER CURIAM:

The judgement of the district court is affirmed for the reasons stated in the Summary Final Judgement dated June 15, 1990.

Based upon the uncontradicted facts, the effective date of the policy in question was May 5th, 1986. Consequently this action was filed within the two year period allowed to contest statements made in the application. Since there is no dispute concerning misrepresentations in the relevant medical history and that the policy would not have issued but for those omissions, appellee was entltled to prevail.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 90-5711, 91-5435

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

Plaintiff-Appellee

versus

THOMAS B. KEE,

Defendant, Appellant.

On Appeal from the United States District Court for the Southern District of Florida

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Before FAY, HATCHETT and DUBINA, Circuit Judges

BY THE COURT:

Appellee's motion to strike portions of Appellant's reply brief in case No. 90-5711 is denied.

Appellant's motion to quash

Appellee's motion to strike portions of the reply brief in case No. 90-5711 is denied.

Appellee's motion for attorney's fees in case No. 91-5435 is denied.

Appellant's motion to quash Appellee's motion for attorney's fees in case No. 91-5435 is denied.

PLEASE SEE

EXHIBIT "E"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 90-5711, 91-5435

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

Plaintiff-Appellee

versus

THOMAS B. KEE,

Defendant, Appellant.

On Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion April 27, 1992, 11th Cir., 1992, _____F.2d____)

Before: FAY, HATCHETT and DUBINA, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor any other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

(S) PETER FAY
UNITED STATES CIRCUIT JUDGE

EXHIBIT "A"

IN THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF
FLORIDA

CASE NUMBER:88-793-CIV-RYSKAMP

PROVIDENT LIFE AND
ACCIDENT INSURANCE COMPANY,

Plaintiff,

vs.

THOMAS B. KEE,

Defendant.
_____/

MOTION FOR SUMMARY JUDGEMENT AND
MEMORANDUM OF LAW IN SUPPORT
THEREOF

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INTRODUCTION

In this action, Provident seeks to rescind the disability insurance policy issued to defendant on the ground that dafendant made material misrepresentations regarding his medical

history in his application for said policy.

Respectfully submitted,
SHUTTS & BOWEN
Attorneys for Plaintiff
1500 Edward Ball Building
100 Chopin Plaza - Miami Center
Miami, Florida 33131
(305) 358 6300

_____
John E. Meagher

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 22nd day of June, 1989 to (counsel for Defendant).

IN THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF
FLORIDA

CASE NUMBER:88-793-CIV-RYSKAMP

PROVIDENT LIFE AND
ACCIDENT INSURANCE COMPANY,

Plaintiff,

vs.

THOMAS B. KEE,

Defendant.
_____/

(DEFENDANT'S) RESPONSE TO
MOTION FOR SUMMARY JUDGEMENT

Page 2

10. Thomas B. Kee made no fraudulent misrepresentations in his application for this policy.

CARUSELLO & HUNNEFELD, P.A.
Attorney for Defendant

_____
Henry J. Hunnefeld, Esquire

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served/mailed/faxed this 5th day of July, 1989 to (counsel for Plaintiff).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-5711

THOMAS B. KEE,

Appellant,

v.

PROVIDENT LIFE AND ACCIDENT
INSURANCE COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF THE APPELLEE

Brenton N. Ver Ploeg, P.A
John E. Meagher
Michael B. Berger
SHUTTS & BOWEN
Attorneys for Appellee
201 South Biscayne Boulevard
1500 Miami Center
Miami, Florida 33131
(305) 358-6300

STATEMENT OF THE CASE

Page 3

While conceding that he had, in fact, made material misrepresentations in his application, Kee asserted that, Provident's rescission claim was barred by the 2-year contestability period contained in the policy.

(Kee's Note - these are the pertinent passages of the three Pleadings of Exhibit "A". They are excerpted from the original Petition Exhibits which are available in a Lodging with the Clerk.)

EXHIBIT "B"

IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR DADE
COUNTY, FLORIDA

CRIMINAL DIVISION
(Carney)

CASE NO. 85-28482

THE STATE OF FLORIDA,

Plaintiff,

vs.

THOMAS B. KEE,

Defendant.
_____/

Miami, Florida

January 9, 1989

The above-entitled cause came on for hearing before the Honorable Thomas M. Carney, judge of the above-styled court, at the Metropolitan Justice Building, 1351 Northwest 12th Street, Miami, Florida, on January 9, 1989, at or about 1:30 p.m.

To Arthur Stillman, M.D.:

Q. Okay. Now, did you, in fact, evaluate Mr. Kee?

A. Yes. I did so on December 3, 1984.

Q. Was that the first time you had a face-to-face meeting with Mr. Kee?

A. Yes.

Q. Did you subsequently have the opportunity to meet with Mr. Kee?

A. Yes. I evaluated him some four times after that.

Q. Okay. Now, at any time, did you actually treat Mr. Kee?

A. No. I didn't actively treat him.

Q. During that time frame, specifically meaning 1984, '85, or

'86, during that time frame.

A. I didn't really treat him. I advised him about treatment, but I didn't actively treat him.

Q. And--but, did you ever go into a full explanation of what your understanding, your evaluations were with Mr. Kee?

A. No.

Q. Okay. Except for the most recent ones, 1988--during 1984, '85, and '86, were those reports or written evaluations that you prepared ever given to Mr. Kee?

A. No. I never gave him--no.

Q. And you never explained those evaluations to Mr. Kee?

A. No. I felt that was up to his attorney.

Q So you were actually hired

and paid by Mr. Kee's attorney at that time for the specific purpose which you complied with.

A. I believe so.

EXHIBIT "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-5711

THOMAS B. KEE,

Appellant,

v.

PROVIDENT LIFE AND ACCIDENT
INSURANCE COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF THE APPELLEE

Brenton N. Ver Ploeg, P.A
John E. Meagher
Michael B. Berger
SHUTTS & BOWEN
Attorneys for Appellee
201 South Biscayne Boulevard
1500 Miami Center
Miami, Florida 33131
(305) 358-6300

Page 5

On or about December 2, 1987, Kee notified Provident that he intended to file a disability claim. (R1-26-3). (Kee's comment - PROVIDENT HAS NO CLAIM OR NOTIFICATION.) Kee, however, did not file a claim form with Provident until shortly after September 1, 1988. (R1-26-3) In his claim form, Kee stated he was totally disabled due to a "bipolar affective disorder" which began on an undetermined date. (R1-26-3,4) Provident's subsequent claim investigation (Kee's comment - INAPPROPRIATE.) revealed that Kee's medical history was not fully disclosed in the application. (R1-26-4).

(Kee's note - A Lodging of the original pleadings have been filed with the Clerk.]

IN THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER:88-793-CIV-RYSKAMP

PROVIDENT LIFE AND
ACCIDENT INSURANCE COMPANY,

Plaintiff,

vs.

THOMAS B. KEE,

Defendant.
_____/

Page 3 - Appellee's pleading

LOCAL RULE 10(J)(2) STATEMENT OF
MATERIAL FACTS AS TO WHICH THERE IS
NO GENUINE ISSUE TO BE TRIED

Page 3

On or about December 2, 1987, defendant notified Provident that he intended to file a disability claim.

(Kee's comment - PROVIDENT HAS NO CLAIM OR NOTIFICATION.)

and

Page 4

Provident's subsequent claim investigation revealed that Kee's medical history was not fully disclosed in the application. (R1-26-4). (Kee's comment - INAPPROPRIATE.)

(Kee's note - These are the pertinent passages of the three Pleadings of Exhibit "C" which are available in a Lodging with the Clerk).

PLEASE SEE

EXHIBIT "E"

EXHIBIT "D"

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY

CHATTANOOGA, TENNESSEE

AGENTS AGREEMENT

ACCIDENT DEPARTMENT

The Accident Department of Provident Life and Accident Insurance Company, called the Company in this agreement, and Thomas B. Kee of Miami, Florida, called the Agent, agree as follows:

1) The Company appoints the Agent, directly or through its General Agent, to solicit and submit applications for individual health insurance policies within the prescribed territory, to deliver policies issued

from those applications and to receive initial premiums, transmitting them to the Company.

2) The Agent will be entitled to commissions on premiums received by the Company for policies issued from applications secured by the Agent according to the schedule below.

Divisions 6 and 76	50%
Division 66	30%

The Company may vary commission rates for policy forms which may be introduced after this agreement is effective. [Emphasis added.]

(Kee's note - This Agent's agreement

was dated April 7, 1978 and is available in its entirety, with other exhibits, in the Lodging filed with the Clerk.)

EXHIBIT "E"

IN THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER:88-793-CIV-RYSKAMP

PROVIDENT LIFE AND
ACCIDENT INSURANCE COMPANY,

Plaintiff,

vs.

THOMAS B. KEE,

Defendant.
_____/

SUMMARY FINAL JUDGEMENT

The Plaintiff, Provident Life and Accident Insurance Company (Provident), brings this action seeking rescission of a disability insurance policy issued to defendant, Thomas B. Kee (Kee). Kee filed a claim under the policy and Provident denied the claim on the basis that Kee had made material misrepresentations regarding

the medical history in his application for insurance. Provident maintains that it is entitled to rescission pursuant to Florida Statutes (1982) section 627.409(1)(b) and (c) because the misrepresentations were material to the acceptance of the risk. Provident has moved for summary judgement contending that there is no genuine issue of material fact and that it is entitled to judgement as a matter of law pursuant to Rule 56. See Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

In opposing the motion for summary judgement, Kee does not deny that material misrepresentations were made in the application for insurance. Instead, Kee contends that Provident

is not entitled to summary judgement because the incontestability clause in the policy bars Provident from contesting the misrepresentations after the policy has been "in force" for two years. Additionally, Kee moved for summary judgement on the ground that no genuine issue of material fact exists as to the incontestability of the misstatements and that he is entitled to a judgement as a matter of law.

In accordance with Florida law/1, the policy of insurance

1/ Florida Statutes (1982) section 627.607 provides:

(1) The contract shall include the following provision:

"Time limit on Certain Defenses: After 2 years from the issue date, only fraudulent misstatements in the application may be used to void the policy or deny any claim for loss incurred or disability starting after the 2-year period."

(2) A policy which the insured has the right to continue in force subject to its terms by the timely payment of premium until at least age 50 or, in the case of a policy issued after age 44, for at least 5 years from its date of issue may, in lieu of the provision set forth in subsection (1) include the following provision:

"Incontestable:

(a) Misstatements in the Application: After this policy has been in force for 2 years during the insured's lifetime (excluding any period during which the insured is disabled), the insurer cannot contest the statements in the application.

(b) Preexisting conditions: No claim for loss incurred or disability starting after 2 years from the issue date will be reduced or denied because a sickness or physical condition, not excluded by name or specific description before the date of loss, had existed before the effective date of coverage." (emphasis added).

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issued by Provident contained the following provision:

INCONTESTABLE

1. After this policy has been in force for two years during your lifetime, we cannot contest the statements in the application.

2. No claim for loss incurred or disability that starts after two years from the Effective Date of this policy will be reduced or denied on the ground that a sickness or physical condition not excluded by name or specific description had existed before the Effective Date of this policy by paying premiums when due. (emphasis added).

with the terms of the statute and the policy clearly defined, the sole issue for this court on the motions for summary judgement is whether Provident brought this action within two years after the policy was "in force".

Although the phrase "in force'

has not been defined by either the Florida Legislature or the policy issued by Provident, Florida courts have equated the phrase "in force" with the phrases "in effect" and "effective date." See Prudential Insurance Company of America v. Rhodriquez, 285 So.2d 689, 690 (Fla. 3d DCA 1973) ("From a reading of the incontestability clauses, it is clear that after the policies are in effect for two years they would become incontestable."); and Aetna Life Insurance Company v. Thorn, 315 So.2d 219, 220 (Fla. 3rd DCA 1975) ("After reading the [incontestability] clause which is unambiguous, it is abundantly clear that as of June 7th, 1971, the effective date of the policies, the two year period thereunder began to run, and,

therefore, appellant's action for rescission filed on June 7th, 1973 was untimely.")

Furthermore, the following language of the policy indicates that the policy would be "in force" when it bacame "effective":

Effective date of insurance

The effective date is based on several considerations i.e., date of application and medical examination, payment of premium, and physical insurability.

If (1) at least 1/6 of the annual premium for the policy applied for is paid with the application; and (2) the medical examination and supplementary tests, if required, are completed within 90 days of the date of the application; and (3) the proposed insured is insurable under our underwriting rules and practices for the policy and amount applied for, with no restriction and no change in coverage at our standard rate of premium; the individual policy will be dated and the insurance will be in force on the later of:

a) the date of the application;

b) the date of completion of Provident's medical examination and supplementary tests, if required; or

c) the date requested by the proposed insured at the time of the application, but not more than 90 days after the date of the application.

Where coverage is issued as above, the individual policy will not be redated since coverage has been in effect since the effective date.

Premium payment at time of application is not required for Employer sponsored salary allotment applications. All other requirements are applicable.

When any of the above conditions is not met and an individual policy is issued, it will have an effective date 10 days after the issue date. The policy may be delivered and will be in force upon payment of the full first term premium so long as the proposed insured's state of health is the same as that stated in the application. (emphasis added).

According to the terms of the policy, if Kee satisfied the three conditions precedent, then the policy was "in force" on February 4th, 1986, the application date, and this case

is barred by the incontestability clause of the policy because Provident did not bring this action until May 4th, 1988, more than two years later. However, if any of the conditions were not met, the policy was "in force" on its "effective date," May 5th, 1986, and this case would not be time-barred because Provident brought suit within two years of the effective date of the policy.

Although Kee maintains that he satisfied the three conditions precedent to having the policy "in force" on the application date, this argument is belied by the facts of this case. Contrary to his contention, Kee did not satisfy the first condition precedent bwecause he did not pay 1/6 of the annual premium at the time of

application./2 Moreover, Kee did not satisfy the third condition precedent because a change in coverage under the policy occurred. Kee's attempt to undermine the significence of this fact by pointing out that the change was brought about at his request, as opposed to Provident's, is unavailing. Nothing in the language of the policy indicates that satisfaction of this condition depends upon whether the change was instigated by the

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2/Kee maintains that he paid 1/6 of the premium because at the time of application his premium was only $682.90 and he tendered an amount of $400.00. However, before that policy was issued, Kee requested that his coverage be increased from $1,000 to $3,800. Because of this increase in coverage, the amount of the annual premium was increased to $3,020.86. Thus, to satisfy the condition precedent of paying 1/6 of the annual premium for the policy that was ultimately

issued, Kee was required to tender approximately $503.00. Although he paid the annual premium in full in July of 1986, at the time of application he tendered only $400.00. Thus, it is clear that at the time of application, Kee did not tender 1/6 of the annual premium for the policy that was issued.

---

insured as opposed to the insurer. Thus, based on the terms of the policy and the facts of this case, Kee did not satisfy the three conditions precedent to having the policy go "in force" on the application date. Rather, the policy went "in force" on its effective date, May 5, 1986, which was ten days after the issue date./3 Because this action was filed on May 4th, 1988, it was brought within two years after the policy was "in force" and is not time-barred by the incontestability clause of the policy.

Alternatively, Kee argues that the two-year incontestable period began to run on April 25, 1986, the issue date shown on the policy. However, this position must also fail. Kee's contention that the "issue date" should control is contradicted by the clear wording of the policy. The policy indicates that the issue date is not the date at which the risk commences, but simply "the date of approval by the Home Office" of the insurance company.

Based upon all the evidence presented to the court on the motions for summary judgement, the court finds that there are no genuine issues of material fact and that Provident is entitled to summary judgement as a matter of law. It is therefore

ORDERED AND ADJUDGED that Provident's motion for summary judgement is GRANTED; Kee's motion for summary judgement is DENIED; and SUMMARY FINAL JUDGEMENT is hereby entered for the plaintiff,

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3/Ordinarily, an insured might lack the sophistication to look for the effective date on a policy and to recognize its significance. However, Kee was a general agent for Provident who prepared his own application and never protested the "effective date" of May 5th, 1986, upon receipt of the policy.

Provident Life and Accident Insurance Company, and against the Defendant, Thomas B. Kee.

DONE AND ORDERED at the United States District Court, Miami, Florida

this 15 day of June, 1990.

(S)_____
KENNETH L. RYSKAMP
UNITED STATES
DISTRICT JUDGE

Copies furnished to:
John E. Meagher, Esq.
Henry J. Hunnefeld, Esq.

EXHIBIT "F"

APPLICATION

I hereby apply to Provident Life and Accident Insurance Company for insurance based on the following representations:

1 (a) Full Name?

(Print) Thomas B. Kee et al.

. . . .

(Above the signature line is printed)
To the best of my knowledge and belief, all of the foregoing statements and all of those in Part II if any of this application are true, complete, and correctly stated. [Emphasis added.]

(Kee's mote - A copy of the complete application and medical forms as of policy binding date of February 4th, 1986 is in a Lodging with the Clerk inasmuch as it would have been impossible to reduce them to conform with the Court's Rules).

EXHIBIT "G"

THE MIAMI HERALD

SUNDAY, JUNE 10, 1990 - front page

Insurers cheat Medicare, suits claim

Some of the nation's biggest health-insurance companies are cheating taxpayers out of as much as $ 1 billion a year by side-stepping a law designed to bail out Medicare, federal investigators say.

page 20A

. . . the Justice Department filed suit 14 months ago against Provident Life and Accident Insurance Co. of Chattanooga, Tenn. The department is seeking to recover as much as $223 million from Provident.

According to the government's and Bustamonte's suits, Provident knowingly and routinely violated the Tax Equity and Fiscal Responsibility Act (1982).

"When Provident got a bill that showed Medicare had already paid primary, it would issue a check only for the secondary 20 percent."

Court files in the suits against Provident include a stack of internal memorandums that, the plaintiffs say, provide further evidence that the company knew what it was doing.

One memo, from a Provident regional manager to his boss says, "It is quite obvious to everyone that Medicare has no way of knowing who in their claim

files is an active employee. Consequently, they will never be able to track this down and pass it back to the insurance industry."

Another memo spells out Provident's policy on claims from the working aged: "Claims on which information is submitted that Medicare has paid as primary should be paid as secondary. The balance of Provident's legal liability should not be paid until Medicare requests that they be reimbursed. Under no circumstances should Provident's liability in excess of our secondary payment be paid to the provider(s) or the Medicare beneficiary."

In yet another memo a Provident employee opines those claims instructions create "a violation of federal law when we pay as secondary."

Provident has blacked out that line on the copy of the memo it turned over to Bustamonte during the pretrial discovery process. The company has also gone to court to try to prevent the writer of the memo from testifying before the Senate subcommittee.

Other Provident memos indicate that the company was keeping logs of Medicare-paid claims that should have been paid by Provident. When litigants requested those logs the company said they had been destroyed.

Of the five companies (Provident, Prudential, Jefferson-Pilot, Blue Cross and Blue Shield, and Pan-American) sued by Bustamonte, Justice has filed suit against only Provident.

(Kee's note - The complete article will be found in a Lodging with the Clerk).